

Kingdom. In *Contract & Trading Co. (Southern) Ltd. v. Barbey & Others* [1960] AC 244, the House of Lords decided that paragraph 4 of Schedule IV was apt to include an obligation arising under a bill of exchange as well as any other monetary obligations. A debt existed even though treasury permission had not been granted and it might not be paid without that permission. Accordingly, a debt under a bill of exchange was one to which paragraph 4 applied, and a claim for this recovery was not defeated by the fact that permission to pay had not been given.

The above decision of the House of Lords was followed by Eusoff Chin J, as he then was, in *Bank of New Zealand v. Wong Kee Tat* [1990] 2 MLJ 435 where the learned Judge held that a loan transaction was not illegal and void simply because the permission of the Controller of Foreign Exchange had not been sought.

Following the decision in *Contract and Trading Co.*, under paragraph 4 of the Fourth Schedule a demand for the repayment of a debt due in the bankruptcy notice is not defeated by the fact that the permission of the Controller has not been obtained.

Under the Exchange Control (Form of Bankruptcy Notice) Order, 1992, [P.U.(A) 127/92] the form of the bankruptcy notice to be used for the purposes of the Act shall be in Form No. 5 as prescribed by r. 91 the Bankruptcy Rules 1969.

In my opinion the bankruptcy notice does not contravene the Exchange Control Act and it is a valid notice issued in pursuance of the law. It conforms with Form 5 of the Bankruptcy Rules. The judgment debtor did not comply with the bankruptcy notice. Failure to comply with the bankruptcy notice constitutes an act of bankruptcy. The judgment debtor could have complied with the bankruptcy notice by making payment to Messrs. Shearn Delamore & Co. in Kuala Lumpur in the ringgit equivalent.

For the reasons stated above, I dismissed the appeal with costs.

RE: SHARIFAH MOHSIN;
EX PARTE: PERWIRA HABIB BANK
MALAYSIA BERHAD

HIGH COURT, SHAH ALAM
TUAN MOHD HISHAMUDIN BIN MOHD
YUNUS JC

[BANKRUPTCY NO. 29-971-91]
25 FEBRUARY 1993

BANKRUPTCY: Bankruptcy notice - Creditor's petition - Supporting affidavits and affidavit-in-reply filed and served - Grounds raised at hearing not in affidavit-in-reply - Preliminary objections by judgment creditor - Non-compliance with r. 117 of Bankruptcy Rules 1969 - Whether r. 274 of Bankruptcy Rules 1969 could be invoked - Acceptance by creditor of partial payment of debt by third party - Whether bankruptcy notice nullified by such acceptance - Necessity of remainder of maintaining debt at the minimum statutory requirement - Sections 3(1)(i), 5(1)(a), 6(2) Bankruptcy Act 1967.

In pursuance to a bankruptcy notice and creditor's petition, three supporting affidavits were served on the judgment debtor. In the affidavit-in-reply, the judgment debtor deposed that there was non-disclosure of material fact which violated s. 5(2) of the Bankruptcy Act. She further contended that there was a discrepancy in the amount owed by the judgment debtor, and therefore the creditor's petition was a nullity. However, on the hearing of this matter, the judgment debtor departed from the issues aforesaid and opted for new grounds altogether. She contended instead that the judgment creditor had contravened s. 3(1)(i) of the Bankruptcy Act 1967, as the bankruptcy notice was not in accordance with the terms of judgment relied upon by it and secondly, that the bankruptcy notice was fundamentally defective, it being issued against a single person while judgment was obtained against co-defendants. And it was finally contended that the judgment creditor's acceptance of partial payment had precluded the judgment creditor from relying on the original judgment for the purpose of the petition as there existed an agreement after judgment for payment of monies to the judgment creditor.

Held:
[1] The judgment debtor had contravened r. 117 of the Bankruptcy Rules, 1969 as she had failed to depose the relevant grounds raised during the hearing in her affidavit-in-reply. The Court refused to invoke r. 274. Since the purpose

of r. 117 was to avoid surprises it would be unfair to allow the petitioning creditor to be caught by surprise when the judgment debtor had ample time to state her objections before the hearing.

[2] The judgment creditor's acceptance of part payment after instituting bankruptcy proceedings herein does not nullify the bankruptcy notice so long as the debt remaining does not fall below the RM10,000 limit.

[3] As there were no material defects in the bankruptcy documentation, the receiving and adjudication orders were granted.

[Receiving and adjudication orders granted].

Case referred to:

Datuk Mohd Sari bin Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn. Bhd. [1992] 2 MLJ 344 (dist)

Re Patel (a debtor) [1986] 1 All ER 522 (foll)

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 5(1)(a), 6(2)

Bankruptcy Rules 1969, rr. 117, 274

Bankruptcy Act 1914, ss. 4(1)(a), 5(2) (UK)

For the judgment creditor - Padmanathan

For the judgment debtor - S. Kanawagi

For the official assignee - Nordeen bin Abu

JUDGMENT

Mohd Hishamudin Bin Mohd Yunus JC:

In this case, the bankruptcy notice was filed on 22 July 1991 and served on the judgment debtor on 5 September 1991. The bankruptcy notice was based on a judgment entered on 19 July 1989 for a sum of RM376,102.40. The creditor's petition was filed on 18 November 1991 and served on 26 February 1992. In the bankruptcy notice and creditor's petition, the amount of claim (after adding interests and costs but subtracting payment made by the judgment debtor) was RM503,819.68.

The petitioner filed three supporting affidavits. The first was filed on 29 May 1992, the second on 15 September 1992 and the third on 27 January 1993. All three affidavits were affirmed by the petitioner's Kuala Lumpur Branch Manager. The judgment debtor filed one affidavit on 28 October 1992.

In challenging the petition, the judgment debtor raised two grounds. First, she contended that there was non-disclosure of a material fact and therefore a violation of s. 5(2) of the

a Bankruptcy Act. This was explained in her affidavit as follows:

2. I executed a joint and several guarantee with my husband Mohsin Abdullah in respect whereof I and my husband were both sued *vide* Civil Suit No. D4-22(23)-2562-88. The guarantee was executed by us in respect of facilities granted to a company known as Iranian Carpet (M) Sdn. Bhd., the first defendant in the civil suit, in which we were both directors.

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3. As security for the facilities my husband had by a "third party charge", charged a parcel of land registered in his name held under H.S. (M) 6687 for Lot. No. 8642 (Lot 54137) Mukim Gombak, Selangor to the judgment creditors.

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4. I crave leave to refer to the creditor's petition herein wherein by paragraph 3 the judgment creditor say that "they do not nor does any person on our behalf hold any security on the said debtor's estate ... for the payment of the said sum."

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5. I am advised and verily believe notwithstanding the fact that the property is not in my name, I am nevertheless entitled to the benefit of the said security. In the circumstances the non-disclosure of this fact is, I am advised, a violation of s. 5(2) of the Bankruptcy Act.

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Secondly, she contended that there was a serious error in the records with regard to the amount actually due from the judgment debtor to the judgment creditor and therefore the petition was a nullity. This ground was set out in her affidavit as follows:

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7. My husband thereafter proceeded to negotiate a sale of the said property by means of a private treaty, very much in excess of the reserve price fixed by the Court at the instance of the judgment creditor, namely, for a sum of RM240,000.

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8. By an affidavit dated 21 May 1992, the said judgment creditor filed an affidavit purportedly with a view to showing that the amount in the creditor's petition had been reduced by the remittance from the proceeds of the sale of the said security. By paragraph 5 thereof it was stated that a sum of RM303,808.51 was due and owing to the judgment creditor.

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9. As both the bankruptcy notice and the creditor's petition show that I was at all material times owing a sum of RM503,819.68 (at the time of the issue of the bankruptcy and the creditor's petition), the repayment of a sum of RM240,000 would reduce the amount to the judgment creditor to RM263,819.68 and not RM303,008.55.

10. I am advised and verily believe that as the creditor's petition is supported by an affidavit of truth and as further affidavit has been filed in support which appear to be manifestly incorrect in so far as the amount now due to the judgment creditor is concerned, I am advised and verily believe that the said affidavit cannot be read in support of this petition.

11. I therefore pray that as there is a serious error in the records with regard to the amount actually due to the judgment creditor, the petition is a nullity and should therefore be dismissed with costs.

Although the above were the two grounds (and the only grounds) of objection set out in the judgment debtor's affidavits, yet, on the day of the hearing (25 February 1993), none of these grounds was touched upon by learned Counsel for the judgment debtor. Instead, learned Counsel submitted three new grounds. The first was that the bankruptcy notice was not in accordance with the terms of the judgment relied upon by the petitioning creditor, and therefore it was not in compliance with s. 3(1)(i) of the Bankruptcy Act 1967.

Secondly, it was contended that the bankruptcy notice was fundamentally defective as to render it invalid; defective in the sense that the judgment obtained by the judgment creditor was a joint judgment obtained against two defendants, whereas the bankruptcy notice issued was for the whole sum against a single person, thus there was a violation of s. 3(1)(i) of the Bankruptcy Act.

Thirdly, it was contended that since the judgment creditor had admitted that there had been a payment of RM240,000 by a third party, therefore there was an agreement after judgment pursuant to which money was paid to the judgment creditor; and by reason of this agreement, the judgement creditor cannot now rely on the original judgment for the purpose of the petition.

a As to the first ground, learned Counsel for the petitioner made a preliminary objection on the ground that she was caught by surprise since none of the judgment debtor's affidavits make any mention of this ground. She submitted that there was non-compliance with r. 117 of the Bankruptcy Rules 1969 which stipulates:

b 117. Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days before the day on which the petition is to be heard.

c Learned Counsel for the judgment debtor conceded that there had been non-compliance with r. 117. However, he urged the Court to invoke r. 274 of the Bankruptcy Rules 1969 or, alternatively, to grant him a postponement to enable him to file the necessary affidavit. Rule 274 provides:

e 274. Non-compliance with any of these rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

f I refused to invoke r. 274 since the purpose of r. 117, I believe, is to avoid surprises and I thought it would be unfair to allow the petitioning creditor to be caught by surprise when all the while the judgment debtor has had ample time to state whatever objection she had before the hearing. If it was the judgment debtor's contention that the bankruptcy notice was not in accordance with the terms of the judgment, then r. 117 required the judgment debtor to explain in clear terms in her affidavit in what way that was so.

g As to the request for a postponement, this was objected to by learned Counsel for the petitioning creditor. Since the judgment debtor has had ample time to state whatever objection she had before the hearing, I did not think that there was any merit in the application for postponement, and so I upheld the objection.

h On the second ground, again learned Counsel for the petitioning creditor objected on the same ground, that is, she was taken by surprise and that, since this ground was not

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mentioned in any of the judgment debtor's affidavits, therefore there had been non-compliance with r. 117. Learned Counsel for the judgment debtor on the other hand argued that this was a point of law based on the judgment creditor's own documents which the Court could take cognizance. Again here I was of the view that there was a breach of r. 117 and it would be unfair to allow the judgment debtor to take the judgment creditor by surprise.

As to the third ground, it was an agreed fact that the sum of RM240,000 was paid to the petitioning creditor from the proceeds of sale of land belonging to a third party. Learned Counsel for the judgment debtor argued that once the judgment creditor had accepted partial payment, then such an act nullified the bankruptcy notice. Learned Counsel contended that if the judgment creditor still insisted on pursuing, they should have proceeded all over again for a lesser sum by serving a fresh bankruptcy notice. Learned Counsel cited *Datuk Mohd Sari bin Datuk Haji Nuar v. Norwich Winterthur Insurance (M) Sdn. Bhd.* [1992] 2 MLJ 344. In this case cited, a consent judgment had been obtained against the judgment debtor for a certain sum. Subsequently, the judgment creditor and the judgment debtor, through their respective solicitors, made an agreement whereby the judgment debtor agreed to pay the judgment creditor the judgment sum by way of monthly instalments. No terms or conditions were stipulated to provide for the eventuality of a default in the payment of the instalments. After making seven payments of instalments, the judgment debtor defaulted. The judgment creditor, therefore, issued a bankruptcy notice demanding payment of the balance due on the final judgment obtained by the judgment creditor against the judgment debtor. The judgment debtor applied to set aside the bankruptcy notice. The Supreme Court held that the bankruptcy notice was bad on the grounds that:

... in the present case, the terms of the consent judgment were controlled by an outside agreement between the judgment debtor and creditor through their solicitors, and non-compliance with the judgment is not an act of bankruptcy so long as the terms of the judgment are controlled by that outside agreement.

Learned Counsel for the judgment creditor submitted that the facts in *Datuk Mohd Sari* were different from the facts of the present case since in the present case there was no

a evidence of any agreement on the manner of the payment of the judgment sum between the judgment creditor and the judgment debtor. I agreed with learned Counsel that the facts in *Datuk Mohd Sari* were different and therefore that case was irrelevant.

b Learned Counsel for the petitioning creditor then went on to cite *Re Patel* (a debtor) [1986] 1 All ER p. 522 to support her contention that the mere fact that a partial payment was made to the judgment creditor after the bankruptcy notice had been served did not nullify the bankruptcy notice. In *Re Patel*, the bankruptcy notice, served in February 1985, was based on a judgment sum of #[pds. Stg.] 1004. Subsequently there was part payment. The petition was served subsequently based on a debt of #[pds. Stg.] 904 (that is to say the sum mentioned in the bankruptcy notice less the payment made). In May the debtor paid into Court the sum of #250 thereby leaving a balance of #654. It was an agreed fact that the amount of the debt outstanding on the date on which the receiving order was made was less than #750. The relevant statutory provisions are contained in ss. 4 and 5 of the English Bankruptcy Act 1914. Section 4(1)(a) (which is in *pari materia* with s. 5(1)(a) of our Bankruptcy Act 1967, except for the minimum amount) provides:

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4(1)(a) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless (a) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to #750 ...

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Section 5(2) of the English Bankruptcy Act 1914 (which is substantially in *pari materia* with s. 6(2) of our Bankruptcy Act 1967) provides:

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5(2) At the hearing the Court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition.

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Sir Nicolas Browne-Wilkinson V-C in his judgment said:

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In my judgment therefore, both as a matter of construction and by reference to authority s. 5(2) does require proof that at the date of the hearing of the petition the debt on which the

petition is founded must not have been reduced to less than #750 and I so hold. The consequence is that in the present case the registrar had no jurisdiction to make the receiving order on 30 May 1985. The words in s. 5(2) state the preconditions which have to be satisfied before there is any statutory jurisdiction to make the receiving order. **It follows from that decision that petitioning creditors should be careful how they accept part tender of a debt pending the hearing of a petition. They are clearly not bound to accept any tender of part payment.**

[emphasis added]

In my view, although in *Re Patel* the issue was slightly different from the present case, nevertheless it can be implied from that judgment that the acceptance of part payment by a judgment creditor after service of the bankruptcy notice or the petition **by itself** does not nullify the bankruptcy notice, so long as the petitioning creditor is careful to ensure that the amount of the debt remaining is not less than the minimum amount stipulated by the Act (and in this country, the amount is ten thousand ringgit).

To sum up, it was my view that the judgment debtor, by putting forward the three new grounds on the day of the hearing, had deviated from the two grounds of objection as set out in her notice of objections and thereby was in breach of r. 117 (this was especially so as regards the first and second grounds), that as regards the third ground, the argument of the judgment debtor's Counsel, with respect, was lacking in merits, and that on the whole I failed to find any material defects whatsoever either in the bankruptcy notice or the creditor's petition. Accordingly I granted the receiving order and the adjudicating order.

a RE: UDOS @ ANDREW AK RIGING; EX-PARTE: SEABANC KREDIT SDN. BHD.

HIGH COURT, KUCHING
DATO' HJ ABDUL KADIR BIN
SULAIMAN J.

[BANKRUPTCY PROCEEDING NO. 95 OF
1994 (II)]
21 JUNE 1994

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BANKRUPTCY: Application to set aside bankruptcy notice - Whether debtor had committed an act of bankruptcy - Whether judgment on which bankruptcy notice was based was a final judgment.

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The judgment creditor obtained judgment in default pursuant to O. 28 r. 6(1) Subordinate Courts Rules 1980 against the debtor in the Magistrates Court. The debtor applied to set aside the judgment in default which application was dismissed by the learned Magistrate. The debtor appealed against the dismissal of his application to set aside the default judgment. In the meantime the creditor applied for the issue of a bankruptcy notice.

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The debtor contended that since the matter concerning the default judgment against him is pending in the High Court, the default judgment is not a final judgment and filed an affidavit to set aside the bankruptcy notice on the ground that it was misconceived and not in accordance with s. 3(1)(i) of the Bankruptcy Act 1967, which provides that a bankruptcy notice is to issue only on a final judgment or final order and execution thereon not having been stayed.

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Held:

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[1] The judgment, being a default one owing to the absence of the debtor at the hearing of the suit by the judgment creditor against him, is not a judgment on the merits. The default judgment, when entered, did not finally dispose of the rights of the parties, the default judgment being liable to be set aside on the making of an application.

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[2] A "final judgment" means a judgment obtained in an action by which the question whether there was a pre-existing right of the plaintiff against the defendant is finally determined, in favour either of the plaintiff or of the defendant. In the present case, the judgment will only be a final one after the debtor has exhausted his remedies given by law. For as long as the debtor had not exhausted his remedies, the fate of the default judgment is not finally determined.

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